85-1859

Supreme Court, U.S.
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CASE NO. 85-1822

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

MARTIN A. LUNDGARD, Appellant

V.

STATE OF OHIO, Appellee

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS

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EDITOR'S NOTE

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MOTION TO DISMISS

Pursuant to Rule 16(1)(B) of the Rules of the United States Supreme Court, the Appellee, State of Ohio, moves this Honorable Court to dismiss the appeal of Appellant, Martin A. Lundgard in Case No. 85-1822.

Respectfully submitted,

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STATEMENT IN SUPPORT OF MOTION

Appellant, Martin A. Lundgard, bases jurisdiction in this case upon 28 U.S.C. Section 1257(2). 28 U.S.C. Section 1257(2) allows jurisdiction in those cases involving state statutes which are alleged to be repugnant to the United States Constitution. Of the three questions presented by the Appellant, only question one (1) gives rise to an appeal under 28 U.S.C. Section 1257(2). The other questions presented by the Appellant are not directly applicable issues under 28 U.S.C. Section 1257(2), but rather involve issues which could only properly be brought before this Court pursuant to 28 U.S.C. Section 1257(3) upon a writ of certiorari. Thus, dismissal of the appeal would result in dismissal of the

ancillary issues, which were presented pursuant to Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029 (1975).

Question one (1) alleges that Section 2907.05(A)(3) and (B) of the Ohio Revised Code violate the Equal Protection Clause of the Fourteenth Amendment because they impose a felony penalty for identical conduct which, under Section 2907.06(A)(4) of the Ohio Revised Code would result in a misdemeanor penalty. Rule 16(1)(b) of the Rules of the United States Supreme Court provides for dismissal of an appeal from a state court when no substantial federal question is presented. The first indication that no substantial federal question has been presented was contained in the entry of the Supreme Court of Ohio in which the

Court stated, "no substantial constitutional question exists therein." (Appellant, Appendix 3a).

Furthermore, this Court has previously held that substantiality does not exist, "where it is evident on the face of the record that the question on the merits is not open to possible contention because it has previously been so specifically and adversely ruled on by the Court as to absolutely foreclose further contention on the subject." Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311 (1902). See also, Levering & Garrigues Co. v. Morring, 289 U.S. 103 (1933); Goosby v. Osser, 409 U.S. 512 (1973).

Appellee, the State of Ohio, contends that no substantial federal question exists in this case because the question has been settled by previous

decisions of the United States Supreme Court. Specifically, in United States v. Batchelder, 442 U.S. 114, 60 L. Ed.2d 755, 99 S. Ct. 2198 (1979), the Court dealt with a similar situation in which two federal statutes provided different penalties for identical conduct. The Court there stated that such a situation did not violate the Due Process Clause noting, "so long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied." Batchelder, supra, at p. 764. Similarly, in addressing the Equal Protection arguments offered, the Court relied on the concept of prosecutorial discretion in stating:

> There is no appreciable difference between the discretion a prosecutor

> exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements. In the former situation, once he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context. The prosecutor may be influenced by the penalties available upon conviction, but this fact standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause.

Batchelder, supra at p. 765. See also, Bordenkircher v. Hayes, 434 U.S. 357 (1978). Clearly, these statements in Batchelder supra, demonstrate that the identical issue presented by the Appellant in the case at bar has been previously decided by this Court, and that this Court has taken a position adverse to that of Appellant.

Thus, according to Zucht v. King, 260 U.S. 174 (1922) and Palmer Oil Co. v. Amerada Corp., 343 U.S. 390 (1952), a failure to meet the substantiality standard is cause for dismissal of an appeal.

CONCLUSION

Based on the decision in Equitable, supra, this Court should dismiss an appeal in which the applicable issue has been decided by this Court in a previous case. In light of Batchelder, supra, it is clear that this is the situation that exists in this appeal and thus this court should dismiss the appeal of the Appellant, Martin A. Lundgard.

Respectfully submitted,

James Fredrick Stevenson
Counsel of Record
Counsel for Plaintiff-Appellee

Jeffrey Mitchell Welbaum
Of Counsel
Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

James Fredrick Stevenson and Jeffrey Mitchell Welbaum certify that three (3) copies of the foregoing Motion To Dismiss were sent by ordinary U.S. Mail to Diane M. Kappeler, Attorney for Defendant-Appellant, Suite 518, 111 West First Street, Dayton, Ohio 45402-1131 this 27th day of May 1986.

James Fredrick Stevenson
Counsel of Record
Counsel for Plaintiff-Appellee

Jeffrey Mitchell Welbaum
Of Counsel
Counsel for Plaintiff-Appellee

28 USCS - Section 1257

Section 1257 State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a statute or any state of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

(June 25, 1948, c. 646, Section 1, 62 Stat. 929; July 29, 1970, P.L. 91-358, Title I, Part D. Subpart 2, Section 172(A)(1), 84 Stat. 590).

Rule 16. Motion to Dismiss or Affirm—Reply—Supplemental Briefs

.1. Within 30 days after receipt of the jurisdictional statement, unless the time is enlarged by the Court of a Justice thereof, or by the Clerk under the provisions of Rule 29.4, the appellee may file a motion to dismiss, or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss, provided that a motion to affirm or dismiss shall not be joined with any other pleading. The Clerk shall not accept any motion so joined.

(a) The Court will receive a motion to dismiss an appeal on the ground that the appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or with these Rules.

(b) The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

(c) The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

(d) The Court will receive a motion to dismiss or affirm on any other ground the appellee wishes to present as a reason why the Court should not set the case for argument.

.2. A motion to dismiss or affirm shall comply in all respects with Rules 33 and 42. Forty copies, with proof of service as prescribed by Rule 28, shall be filed with the Clerk. The Clerk shall not accept a motion or brief that does not comply with this Rule and with Rules 33 and 42, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46. See Rule 28.1.

.3. A motion to dismiss or affirm shall be as short as possible and may not, either separately or cumulatively, exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations included in accordance with Rule 34.1(f), and any appendix.

.4. Upon the filing of such motion, or the expiration of the time allowed therefor, or express waiver of the right to file, the jurisdictional statement and the motion, if any, will be distributed by the Clerk to the Court for its consideration. However, if a jurisdictional statement on cross-appeal has been docketed under Rule 12.4, distribution of both it and the jurisdictional statement on appeal will be delayed until the filing of a motion to dismiss or affirm by the cross-appellee, or the expiration of the time allowed therefor, or express waiver of the right to file.

.5. A brief opposing a motion to dismiss or affirm may be filed by any appellant, but distribution of the jurisdictional statement and consideration thereof by this Court will not be delayed pending the filing of any such brief. Such brief shall be as short as possible but may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

.6. Any party may file a supplemental brief at any time while a jurisdictional statement is pending, calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing. A supplemental brief, restricted to such new matter, may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

.7. After consideration of the papers distributed pursuant to this Rule, the Court will enter an appropriate order. The order may be a summary disposition on the merits. If the order notes probable jurisdiction or postpones consideration of jurisdiction to the hearing on the merits, the Clerk forthwith shall notify the court below and counsel of record of the noting or postponement. The case then will stand for briefing and

oral argument. If the record has not previously been filed, the Clerk of this Court shall request the clerk of the court possessed of the record to certify it and transmit it to this Court.

.8. If consideration of jurisdiction is postponed, counsel, at the outset of their briefs and oral argument, shall address the question of jurisdiction.